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Re: 03-0018 - Whether OPRA permits an agency  
to impose a special service charge  
for a request to inspect government  
records

Dear Mr. Pfeiffer:

You have requested our opinion as to whether the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 et seq., permits a public agency to impose a charge for a request to inspect government records. You are advised that, pursuant to N.J.S.A. 47:1A-5c, an agency is authorized to impose a special service charge where the agency must make an extraordinary expenditure of time and effort to accommodate a request to inspect government records.

New Jersey's Right to Know law, governing the public's access to government records, was substantially amended by the Legislature in 2002. The amended law, now known as OPRA, reaffirms the legislative policy that "government records shall be readily accessible for inspection, copying, or examination by the citizens of this State...." N.J.S.A. 47:1A-1. Where a request is made for a "government record," as that term is defined in N.J.S.A. 47:1A-1.1, the custodian of the government record "shall permit the record to be inspected, examined, and copied by any person during regular business hours." N.J.S.A. 47:1A-5a.

OPRA specifically provides that a person may purchase copies of a government record. N.J.S.A. 47:1A-5b. This section of the statute sets forth the fees that may be charged "for the duplication of a government record embodied in the form of printed matter," where such fees are not otherwise set by law or

regulation. Ibid. Thus, N.J.S.A. 47:1A-5b deals only with purchases of copies of documents and does not govern the situation where the requester seeks simply to exercise his right to inspect a record.

However, the Legislature has recognized that under some circumstances it is appropriate for agencies to impose charges that are separate from the fee schedule established in N.J.S.A. 47:1A-5b for purchasing copies of records. N.J.S.A. 47:1A-5c provides:

Whenever the nature, format, manner of collation, or volume of a government record embodied in the form of printed matter to be inspected, examined, or copied pursuant to this section is such that the record cannot be reproduced by ordinary document copying equipment in ordinary business size or involves an extraordinary expenditure of time and effort to accommodate the request, the public agency may charge, in addition to the actual cost of duplicating the record, a special service charge that shall be reasonable and shall be based upon the actual direct cost of providing the copy or copies; provided, however, that in the case of a municipality, rates for the duplication of particular records when the actual costs of copying exceeds the foregoing rates shall be established in advance by ordinance. The requestor shall have the opportunity to review and object to the charge prior to its being incurred.

This statutory section plainly authorizes imposition of a "special service charge" where the agency has expended an extraordinary amount of time and effort to provide copies of documents. However, the determination of whether a special service charge for inspection of documents is also authorized requires analysis of the legislative intent.

The applicability of N.J.S.A. 47:1A-5c to inspection is not clear on the face of the statute. The initial statutory language indicates that a special service charge for inspection is permissible. Section 5c applies "whenever the nature, format, manner of collation, or volume of a government record embodied in

the form of printed matter to be inspected, examined or copied ... involves an extraordinary expenditure of time and effort to accommodate ...." (emphasis supplied). The reference to "inspected" and "examined" strongly suggests that the statute is not limited to copying. Moreover, this sentence sets forth two distinct situations in which special service charges are allowed: where there is (1) the inability to "reproduce [the record] by ordinary document copying equipment" or where there is (2) an "extraordinary expenditure of time and effort." Since the first category focuses on copying, while the second category does not mention expending time and effort with regard to copying, the implication is that Section 5c is not directed exclusively at copying.

However, this construction appears to be contradicted by the remainder of the section's first sentence, which provides that the agency may charge, "in addition to the actual cost of duplicating the record, a special service charge that shall be reasonable and shall be based upon the actual direct cost of providing the copy or copies." (emphasis supplied). This reference to duplication and copying is inconsistent with the earlier statutory statement that Section 5c applies to inspection and examination, as well as copying.

Where a statute is ambiguous, it must be interpreted in light of the Legislature's intent, as shown by the legislative history and other evidence. Burns v. Belafsky, 166 N.J. 466, 473 (2001). The overriding goal in construing a statute is to determine the legislative intent. Hubbard v. Reed, 168 N.J. 387 (2001). Here, it is apparent that the purpose of N.J.S.A. 47:1A-5c is to permit agencies to recoup the cost of responding to an OPRA request which involves an unusual expenditure of time and effort by public employees. In general, OPRA permits agencies to charge requesters for costs. In other sections of OPRA, the Legislature ensured that agencies would have the ability to recover the costs of responding to a request for access to documents. See N.J.S.A. 47:1A-5b (if actual costs of duplication exceed statutory rates, agency may charge actual costs); N.J.S.A. 47:1A-5d (actual cost of converting record into requested medium may be charged); N.J.S.A. 47:1A-5f (custodian may require deposit against costs where request is made anonymously and cost of reproduction is anticipated to be in excess of \$5). N.J.S.A. 47:1A-5c, consistent with this general policy, specifically expresses the intent that government agencies -- and, as a result, the State's taxpayers -- should not bear the expense in

those situations where responding to an OPRA request requires an excessive effort.

This purpose applies where an agency expends an extraordinary amount of time and effort to accommodate a request to inspect documents. An agency may expend as much time and effort responding to an inspection request as to a copying request. In both situations, the agency must locate and collect the documents, and then review them to determine which are public records and which must be redacted. If copies are requested, employees must spend additional time making copies; if inspection is requested, employees must spend additional time monitoring the inspection. It defies common sense to conclude that where an extraordinary expenditure of time and effort is required, the Legislature intended that agencies may recoup the substantial costs incurred as a result of such activities only where copies of the documents have been requested. Since statutes are to be read sensibly, see DeLisa v. County of Bergen, 165 N.J. 140 (2000), we conclude that N.J.S.A. 47:1A-5c authorizes special service charges for inspection of records.

The legislative history of OPRA supports this conclusion. N.J.S.A. 47:1A-5c, as well as other provisions of the statute, is modeled on Florida's Public Records Act. This Act provides for special service charges, in language similar to that found in OPRA:

If the nature or volume of public records requested to be inspected, examined, or copied pursuant to this subsection is such as to require extensive use of information technology resources or extensive clerical or supervisory assistance by personnel of the agency involved, or both, the agency may charge, in addition to the actual cost of duplication, a special service charge, which shall be reasonable and shall be based on the cost incurred for such extensive use of information technology resources or the labor cost of the personnel providing the service that is actually incurred by the agency or attributable to the agency for the clerical and supervisory assistance required, or both. [Florida Statutes, §119.07(1)(b).]

The Florida Attorney General has construed this statute as permitting imposition of a special service charge both where copies are requested and where only document inspection is sought. Atty. Gen. Op. 11, 2000 W.L. 202135 (Fl. 2000).

In addition, in The Courier Post v. Lenape Regional High School District, Docket No. L-2754-02 (Law Div. 2002) (unreported), Judge Sweeney reviewed N.J.S.A. 47:1A-5c and concluded that it applied to inspection of records. He noted that this section is based on the Florida statute which permits special service charges for inspection. Accordingly, in the case before him, he upheld the School District's right to impose a special service charge for the inspection of the requested documents, in view of the large volume of documents and the extraordinary amount of time needed to locate and assemble them. Although Judge Sweeney's opinion is unreported, it does provide judicial recognition that N.J.S.A. 47:1A-5c is not intended to cover only requests to purchase copies.

Accordingly, this statutory section should be interpreted as authorizing special service charges for an extraordinary expenditure of time and efforts, regardless of whether inspection or copying has been requested. It is a basic rule of statutory construction that all words of a statute are to be given effect. McCann v. Clerk of Jersey City, 167 N.J. 311 (2001). A statute should not be interpreted to render any of its words meaningless. Bergen Comm. Bank v. Sisler, 157 N.J. 188, 204 (1999). These canons would be violated if N.J.S.A. 47:1A-5c is construed as not applying to the inspection of documents. The Legislature expressly used the phrase "inspected, examined or copied" in Section 5c. If this section only applied to copying, the first two words of the phrase would not have been necessary. In view of the deliberate inclusion of the words "inspected" and "examined," as well as the underlying intent of the section to permit agencies to recoup the expenses incurred in making an extraordinary effort to respond to an OPRA request, the subsequent references in N.J.S.A. 47:1A-5c to copying and duplication cannot be meant to limit this section to copying charges.

It bears emphasis that the special service charge for inspection of documents is permissible only where an extraordinary expenditure of time and effort is needed to accommodate the request for inspection. The statutory intent is that in the usual case, there shall be no charge for inspection of documents.

OPRA does not contain a definition of what is "extraordinary" for purposes of N.J.S.A. 47:1A-5c. In the absence of a specific legislative definition or clear legislative intent to the contrary, statutory words are to be given their "generally accepted meaning." N.J.S.A. 1:1-1. See Stryker Corp. v. Director, Div. Of Taxation, 168 N.J. 138, 156 (2001). Thus, the word "extraordinary" in N.J.S.A. 47:1A-5c is to be given its usual meaning of "beyond what is common or usual." Webster's II New Riverside University Dictionary. The meaning of "extraordinary" under OPRA is fact-specific and is not amenable to a general definition which is applicable to all cases. Instead of establishing a bright line definition, the question of what constitutes an extraordinary amount of time must be assessed on a case-by-case basis. See Atty. Gen. Op. 11-2000 (Florida), supra (appropriateness of special service charge must be decided on a case-by-case basis). See also The Courier Post v. Lenape Regional High School District, supra ("extraordinary" requirement of N.J.S.A. 47:1A-5c fulfilled where staff expended 100 hours, over 10 to 15 days, to retrieve and assemble thousands of documents). Cf. Krisburg v. Paterson, No. 2002-55 (Government Records Council 2002) (in absence of contrary factual information, one hour is not "substantial" and "extensive" for purposes of N.J.S.A. 47:1A-5d).

With regard to the calculation of the amount of the special service charge, the statute simply states that the charge shall be "reasonable" and based on "the actual direct cost" incurred. N.J.S.A. 47:1A-5c. In The Courier Post, supra, Judge Sweeney did not make a determination as to the amount the school district could charge. He suggested, in dicta, that it would be appropriate to calculate the hourly wage rates of the clerical and professional employees involved in all tasks related to accommodating the document inspection request, and to multiply those figures by the total hours spent by these employees. Id. at 13.

This formula is consistent with the underlying intent of the statute, which, as discussed above, is to permit recoupment of actual costs where an extraordinary effort is necessary. In view of this purpose, it is reasonable to include costs attributable to both clerical and supervisory work, where participation by supervisory employees was required. See N.J.S.A. 47:1A-5d (where record is converted into another medium, charge may include cost of both clerical and supervisory personnel). Significantly, the Florida statute upon which N.J.S.A. 47:1A-5c is based permits

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supervisory costs to be captured in the special service charge. Section 119.07(1)(b). A Florida court has construed this statute as permitting a charge for the "supervisory personnel necessary to properly review the materials for possible application of exemptions." Herskovitz v. Leon County, No. 98-22 (Fla. 2d Cir. 1998) (unreported, cited in Florida's Government in the Sunshine Manual (2003)). Thus, where a special service charge is permitted, whether for copies of documents or for inspection, it may be appropriate, depending on the circumstances, to include within the charge the time spent by higher-level employees in reviewing which documents could be disclosed.

In addition, the statute provides that "[t]he requestor shall have the opportunity to review and object to the charge prior to its being incurred." N.J.S.A. 47:1A-5c. Accordingly, as would be the case with a request for copies, where a request for inspection requires an extraordinary expenditure of time and effort, the agency may not impose a special service charge without first notifying the requestor and giving him or her the opportunity to review the amount to be charged.

In conclusion, you are advised that N.J.S.A. 47:1A-5c authorizes an agency to impose a special service charge where the agency must make an extraordinary expenditure of time and effort to accommodate a request to inspect government records.

Sincerely yours,

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/s/ Lewis A. Scheindlin  
Deputy Attorney General

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